(10)

No. 85-546

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

FLORENCE BLACKETTER MOTTAZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

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Respondent had notice in 1954 of the sale of the three allotments in which she held an interest, and the listing of her holdings the BIA furnished in 1967 confirmed that the United States no longer held those interests in trust for her. As we have demonstrated in our opening brief, respondent's suit, which was filed 27 years after the sale of the parcels, is barred by the statute of limitations.

In arguing that this suit is not barred, respondent proceeds as if it already has been established that the sale of the allotments in 1954 was unlawful. See Resp. Br. 5-6. However, because the district court granted the United States' motion for summary judgment on statute of limitations grounds (Pet. App. 9a-11a), neither court below had occasion to consider the merits of respondent's claim (*id.* at 4a). Thus, although respondent asserts (Br. 5-6) that none of the heirs requested that the allotments in question be sold and

that she did not receive payment for her interests in them, there has not yet been any occasion for the government to introduce evidence on those issues.[1] Nevertheless, respondent did stipulate in district court that each of the three allotments was sold with the express consent of some of the heirs (J.A. 13), and the record establishes that respondent herself received notice of the impending sales in 1953 and failed to object to them, despite being informed by the BIA that such a failure would be deemed to constitute consent to the sale (J.A. 15-16). This case therefore does not involve an instance in which BIA unilaterally disposed of assets that were held in trust for an Indian.

In any event, the arguments in respondent's brief for avoiding the statute of limitations are without merit under any of the three possible theories of this suit—*i.e.*, whether it is characterized as (a) an action to establish that she, rather than the United States, has the equitable title to the interests she formerly had in the parcels; (b) an action to recover damages for an allegedly illegal sale of those interests in 1954; or (c) a suit for an allotment under 25 U.S.C. 345 and 28 U.S.C. 1353.

A

Respondent insists that at no time in this case has she abandoned her claim of title to the parcels and that, "[t]o the contrary, the claim for title is the essence and bottom line of respondent's case" (Br. 3). Respondent explains her request for damages in the amount of the current fair market value of her interests as merely an "election of

[1]It might frequently be difficult to produce records of such payments and consents many years after the transactions, and indeed it is one of the purposes of statutes of limitations to "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

remedies" (Br. 3, 4)—a demand for money in lieu of the return of the property itself because the land is situated within the Chippewa National Forest and is not readily accessible. In other words, respondent disputes the United States' claim of title to the three parcels as part of the Chippewa National Forest, and she seeks to establish in this suit that she retains a beneficial interest in them. This case therefore necessarily arises under the Quiet Title Act (QTA), 28 U.S.C. 2409a, and it is barred by the 12-year statute of limitations for QTA suits (28 U.S.C. 2409a(f)). Moreover, the QTA does not afford the plaintiff, such as respondent, the right to elect a monetary remedy in lieu of the return of the property. Under 28 U.S.C. 2409a(b), the right to elect between the return of the property and the payment of its value is reserved exclusively to the United States. See U.S. Br. 25-26.

1. In the QTA, Congress consented to the naming of the United States as a defendant in a civil action "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a).[2] This Court held in *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983), that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." The QTA therefore is the exclusive means by which an individual Indian or an Indian tribe may bring an action to challenge the United States' title to real property, whether the Indian plaintiff claims the fee title or only a beneficial interest.

[2]Security interests and water rights were excluded because Congress previously had consented to suit under 28 U.S.C. 2410 and 43 U.S.C. 666 (the McCarrran Amendment) where such interests claimed by the United States are involved. See H.R. Rep. 92-1559, 92d Cong., 2d Sess. 10 (1972).

Respondent argues (Br. 21-22), however, that the QTA is inapplicable to this suit by virtue of the second sentence of 28 U.S.C. 2409a(a), which states (emphasis added):

> *This section does not apply to trust or restricted Indian lands,* nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

Respondent asserts that this case falls within the emphasized exception because, in her view, the three parcels in question are "obviously trust land" (Br. 22). But that assertion of course begs the very question that would have to be decided on the merits of this case if it were not barred by the statute of limitations. In resolving the distinct, threshold question whether the QTA applies, or whether this case instead falls within the exception to the QTA for cases involving Indian lands, it is necessary to look to the nature of the interest the United States *claims* in the land, not the interest (if any) that the plaintiff believes that the United States should claim or actually has. This interpretation is confirmed by the first sentence of 28 U.S.C. 2409a(a), which authorizes suits "to adjudicate a disputed title to real property in which the United States *claims an interest*" (emphasis added).[3] In this case, the United States claims an interest in the three parcels in its own right, for purposes of including them in the Chippewa National Forest, not in a

[3]The fact that jurisdiction under the QTA turns on the interest the United States claims also is supported by 28 U.S.C. 2409a(d), which provides that "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff," and if the disclaimer is confirmed by court order, the jurisdiction of the district court under the QTA shall cease.

capactity as trustee for the heirs of the original Indian allottees.[4]

The legislative history of the QTA also confirms this interpretation. The committee reports state that the exception was intended to exclude "lands held in trust for Indians." S. Rep. 92-575, 92d Cong., 1st Sess. 2, 4 (1971); H.R. Rep. 92-1559, 92d Cong., 2d Sess. 13 (1972). But, as we have said, the three parcels are not now "held in trust for Indians"; rather, respondent contends in this suit that they *should* be so held. Moreover, the legislative history makes clear that the exception was intended to protect against suits by third parties where the interests of the United States and those of the Indians are aligned as potential defendants with respect to a particular parcel of land, in order to ensure that "trust and restricted Indian lands are specifically protected from *challenge*" (S. Rep. 92-575, *supra,* at 6 (emphasis added); H.R. Rep. 92-1559, *supra,* at 10). The purpose was to prevent a "unilateral waiver [by the United States] of the defense of sovereign imunity" in such circumstances, and thereby to preserve the commitments the United States has made to the Indians with respect to lands it holds in trust. *Dispute of Titles on Public Lands: Hearing on S.216, S. 579 and S. 721 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs,* 92d Cong., 1st Sess. 19 (1971). See also H.R. Rep. 92-1559, *supra,* at 10; *Block* v. *North Dakota,* 461 U.S. at 283, 285. By contrast, there is no indication in the legislative history

[4]By contrast, in *Spaeth* v. *Secretary of the Interior,* 757 F.2d 937 (8th Cir. 1985), upon which respondent relies (Br. 22), the United States' claim to the land was based on the position that it was "trust or restricted Indian land[]" within the meaning of 28 U.S.C. 2409a; the United States was not claiming the lands in its own right, as in the instant case. See 757 F.2d at 942-943. Moreover, *Spaeth* was a suit by a third party seeking to quiet his title to the land that the United States claimed on behalf of Indians; it was not, as here, a suit brought by an Indian to dispute the United States' claim of title.

that the exception was intended to apply where there is a dispute between the United States and Indians over title to a particular parcel of land and the Indian appears as a plaintiff in the suit. Compare *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 147-151 (1984). If the exception were construed to apply in such a situation, Indians would have no way at all to settle land disputes with the United States, since the QTA is the exclusive means for resolving such disputes. Respondent has not suggested any reason why Congress would have wanted to exclude Indians from the remedy it afforded all other claimants when it enacted the QTA.

In fact, the legislative history makes clear that Congress did not intend that anomalous result. The bill proposed by the Department of Justice, after which the QTA as finally enacted was patterned, contained the exception for "trust or restricted Indian lands." See S. Rep. 92-575, *supra*, at 7. However, the Senate Committee on Interior and Insular Affairs expanded that provision to exclude as well " 'any lands *claimed* by Indian or Native people based upon aboriginal right, title, use or occupancy" " (*id.* at 2 (emphasis added)). The bill passed the Senate in that form. See 117 Cong. Rec. 46380 (1971). In testimony during the House hearings, the Assistant Attorney General for the Land and Natural Resources Division recommended that the latter provision be stricken, explaining:

> It is not clear whether the purpose of this additional exception is to protect "Indian or Native people" from suits by others or whether it is to protect the United States from suits by "Indian or Native people." Whatever the purpose, it does appear that it might have the latter effect, and we wish to note that it is not the intention of this Department, in proposing legislation consenting to suits against the United States, to bar suits by Indian or Native people asserting claims based upon aboriginal right, title, use or occupancy.

Disputed Land Titles: Hearings on S. 216 and Related Bills Before Subcomm. No. 2 of the House Judiciary Comm., 92d Cong.; 2d Sess. 56 (1972); see also *id.* at 52.[5] In accordance with the Justice Department's recommendation, the Judiciary Committee deleted the additional exclusion added by the Senate for lands "claimed" by Indians (H.R. Rep. 92-1559, *supra*, at 1; 118 Cong. Rec. 35530 (1972)), and the QTA, as finally enacted, contains only the narrower exception for "trust or restricted Indian lands." 28 U.S.C. 2409a(a). This sequence of events confirms what is evident from the text and structure of the QTA and from the other legislative history, discussed above: that the QTA grants consent to suits brought by Indians to resolve disputed questions of title to land in which the United States claims an interest.

2. Because this suit arises under the QTA, it is subject to the statute of limitations in 28 U.S.C. 2409a(f). That restriction is a condition on Congress's waiver of sovereign immunity, and it must be strictly applied. *Block* v. *North Dakota*, 461 U.S. at 287. Subsection (f) provides that "[a]ny civil action under [the QTA] shall be barred unless it is commenced within twelve years of the date upon which it accrued" (emphasis added). There is no exception to this limitation for civil actions brought by Indians, just as there is none for actions brought by States. 461 U.S. at 287-290. Section 2409a(f) provides that an action "shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." The district court found that respondent knew of the sale of the three allotments in 1954 (Pet. App.

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[5]The transcript of the House hearings on the QTA was released by the Committee in 1978. Although the transcript therefore is not printed and bound with the transcripts of the other hearings conducted by the Committee during the 92d Congress, it is available on microfiche through the Congressional Information Service, Serial No. H521-37.

10a). Her cause of action under the QTA therefore "accrued" in 1954, and it was barred long before she filed this suit in 1981.[6]

3. Respondent contends (Br. 18-19, 21-22) that this case arises under 25 U.S.C. 345, not the QTA. As we explain below (see pages 15-18, *infra*), Section 345 was not intended to suits against the United States in connection with the management or disposition of land after it was properly allotted in the first instance. But even if there once was a basis for such a suit under 25 U.S.C. 345 and its jurisdictional counterpart in 28 U.S.C. 1353, that basis has now been displaced by the QTA. Congress intended the QTA to be the exclusive means by which a plaintiff could challenge the United States' title to real property, except where the QTA itself *expressly* preserves other statutory provisions for such suits. In the second sentence of 28 U.S.C. 2409a(a), Congress provided that the QTA "does [not] apply to or affect actions which may be or could have been brought" under 28 U.S.C. 1346, 1347, 1491 and 2410; the lien provision of the Internal Revenue Code; and the McCarran Amendment, 43 U.S.C. 666. Congress did not include actions under 25 U.S.C. 345 and 28 U.S.C. 1353 among those that were unaffected by the enactment of the QTA. That omission in this "precisely drawn, detailed statute" (*Block* v. *North Dakota,* 461 U.S. at 285) reinforces the conclusion that Congress foreclosed suits by Indians against the United States under 25 U.S.C. 345 and 28 U.S.C. 1353 to challenge the United States' title to land. See, *e.g., United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

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[6]The running of the limitations period under 28 U.S.C. 2409a(f) did not result in a transfer to the United States of any title respondent might have to the interests in the former allotments. See *Block* v. *North Dakota,* 461 U.S. at 291-292. As a result, if respondent's claim was valid before that limitations period expired, it remains valid today. Section 2409a(f) forecloses only a particular remedy.

In this respect, the instant case is directly analogous to *Block* v. *North Dakota, supra.* There, the Court noted that there might have been some uncertainty prior to enactment of the QTA with respect to whether the United States' title to property could be challenged in a suit brought against the federal officer charged with supervision of the disputed area. 461 U.S. at 281-282. But the Court declined to consider whether that theory had merit, because the QTA was intended to be the exclusive vehicle for such suits and accordingly had eliminated any viability a suit against the officier might have had for that purpose. *Id.* at 282-286. That same reasoning applies here.

B

Respondent argues (Br. 9-16) that the district court had jurisdiction over this suit under the Tucker Act, 28 U.S.C. 1346(a)(2), insofar as she seeks money damages for the allegedly unlawful sale of her interests in the three allotments in 1954. We agree that the Tucker Act furnishes the basis for jurisdiction over a damage action such as this—although, as respondent concedes (Br. 9-11), in order to recover, she would be required to demonstrate that the 1954 sale violated a statutory duty of BIA and that the statute upon which she relies can fairly be interpreted as mandating compensation for the damages sustained. *United States* v. *Mitchell (Mitchell II),* 463 U.S. 206, 217 (1983); *United States* v. *Testan,* 424 U.S. 392, 400 (1976).[7]

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[7]The theory of such a suit is different from that discussed in Point A. There we address respondent's argument that she is entitled to a money judgment in the amount of the *current* fair market value of the land as a substitute for the return of the land itself. Under the theory discussed in this Point B, respondent apparently would accept the 1954 sale as a fait accompli for present purposes, and seek a money judgment to compensate her for the injury she suffered in 1954 because of the allegedly unauthorized sale. Under this theory, damages would be measured not by the current value of the interests respondent had in the three parcels (as respondent seeks in the complaint (J.A. 10)), but by the loss she

There is no need to consider the merits of her claim, however, because this suit is time-barred under 28 U.S.C. 2401(a) insofar as it arises under the Tucker Act. Section 2401(a) provides, with one exception not relevant here, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Respondent's cause of action first accrued in 1954, when she had notice of the sale of the three allotments by BIA. See *United States* v. *Kubrick*, 444 U.S. 111, 120 (1979). This suit was commenced in 1981, far more than six years later, and it therefore is barred.

Respondent concedes (Br. 16-17) that this six-year statute of limitations in 28 U.S.C. 2401(a) applies to Tucker Act suits in district court as a general matter. She argues (Resp. Br. 18, 20), however, that Section 2401(a) should not be construed to bar a suit brought by an Indian with respect to property that was once held in trust. This argument is without merit.[8] Section 2401(a) applies to "*every civil action*" commenced against the United States (emphasis added). It contains no exception for suits by Indians in relation to trust property. The only exception, which has no

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suffered in 1954—which presumably would be the value of those interests when the three parcels were sold, less the amount that she received (or that was paid into her trust account) for those interests in 1954.

[8]Respondent also defends (Br. 16-18) the court of appeals' holding that, under *Ewert* v. *Bluejacket*, 259 U.S. 129, 137 (1922), no cause of action "accrues," and that the statute of limitations therefore does not begin to run, where the underlying transaction allegedly was void. We have explained in our opening brief (U.S. Br. 16-21) that this holding was clearly wrong, and respondent has not advanced any new arguments in support of it. The holding in *Ewert* v. *Bluejacket, supra*, that the state statute of limitations was inapplicable turned on the Supremacy Clause. See *County of Oneida* v. *Oneida Indian Nation (Oneida II)*, No. 83-1065 (Mar. 4, 1985), slip op. 13 n.13. Neither *Ewert* v. *Bluejacket, supra*, nor *Oneida II* furnishes any basis for avoiding the explicit *federal* statute of limitations applicable to suits against the *United States*.

application here, is for a person who was "under legal disability or beyond the seas" when the cause of action accrued (*ibid.*). Congress's provision for this one exception strongly indicates that no other exceptions from the all-inclusive language of Section 2401(a) should be implied.

Moreover, as we have shown in our opening brief (U.S. Br. 29-31), the legislative history of 28 U.S.C. 1505, which extended Tucker Act jurisdiction to suits brought by Indian tribes, demonstrates that Congress intended suits by Indians to be subject to the same defenses and limitations—including the statute of limitations—as Tucker Act suits brought by other claimants. See also *United States* v. *Mitchell (Mitchell I)*, 445 U.S. 535, 539 (1980). Accordingly, the Court of Claims and the Federal Circuit consistently have held that the six-year statute of limitations in 28 U.S.C. 2501 is applicable to Tucker Act suits brought by Indians or Indian tribes, even where there is a "trust" relationship between the United States and the Indians concerned. See, *e.g.*, *Menominee Tribe* v. *United States*, 726 F.2d 718, 721-722 (Fed. Cir. 1984), cert. denied, No. 83-1922 (Oct. 1, 1984); *Fort Mojave Tribe* v. *United States*, 210 Ct. Cl. 727, 728 (1976); *Andrade* v. *United States*, 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971). Nor has an exception for such situations been recognized by other courts of appeals under 28 U.S.C. 2401(a). See *Loring* v. *United States*, 610 F.2d 649, 650 (9th Cir. 1979); *Christensen* v. *United States*, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372; *Big Spring* v. *United States Bureau of Indian Affairs*, 767 F.2d 614, 616-617 (9th Cir. 1985), petition for cert. pending, No. 85-1380.

Respondent nevertheless contends (Br. 18, 20) that the statute of limitations in 28 U.S.C. 2401(a) should not be construed to apply to a suit by an Indian where there is an

"express trust." However, that the relationship between the United States and the Indian plaintiff might be characterized as a "trust" has never been recognized by the courts of appeals as a basis for a supposed exception in Indian cases, as respondent urges.[9] The principle respondent apparently has in mind is far narrower, and has no application here.

In *Capoeman,* the Court of Claims did observe that the statute of limitations would not bar a suit by an Indian that involved a liquidated claim, the validity of which was not contested by the government and for which money had been appropriated. 440 F.2d at 1003, citing *United States* v. *Taylor,* 104 U.S. 216 (1881); *Wayne* v. *United States,* 26 Ct. Cl. 274 (1891); and *Russell* v. *United States,* 37 Ct. Cl. 113 (1902). See also *Christensen* v. *United States,* 583 F. Supp. 1539, 1540-1541 (D. Nev. 1984), aff'd, 755 F.2d 705, 706-707 (9th Cir. 1985), petition for cert. pending, No. 85-372. But these cases do not rest on a finding of an actual "exception" to the statute of limitations. In such a case, the United States holds the funds in question for the beneficiary and is under a continuing duty to make them available for his benefit upon demand. As a result, the beneficiary is under no obligation to make such a demand within any particular period of time. See *United States* v. *Taylor,* 104 U.S. at 221-222.

However, the statute of limitations would begin to run in such a case if the beneficiary made a demand that the money

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[9]Contrary to respondent's contention, the Federal Circuit in *Menominee Tribe* v. *United States, supra,* did not recognize any such broad exception; it simply observed that an exception for situations involving an "express trust" had been urged in a prior case, *Fort Mojave Tribe* v. *United States, supra.* See 726 F.2d at 722. In its brief order in *Fort Mojave Tribe,* the court stated: "The facts do not show the existence of an express trust. The statute of limitations applies to Indians the same as to anyone else." 210 Ct. Cl. at 728. These two sentences scarcely constitute an endorsement of respondent's argument for a special exception for Indian plaintiffs generally.

be paid or used for his benefit and the responsible government official declined to do so. *United States* v. *Taylor,* 104 U.S. at 222; *Wayne* v. *United States,* 26 Ct. Cl. at 289; *Russell* v. *United States,* 37 Ct. Cl. at 118. That result would be but a particular application of the established rule that where property *is* held under an "express trust" (in *Taylor* and related cases, the statutory directive that the money be retained in the Treasury for the benefit of a particular person), the statute of limitations begins to run when the trustee repudiates the trust (see, *e.g., Taylor* v. *United States,* 104 U.S. at 222; *Philippi* v. *Philippe,* 115 U.S. 151, 156-157 (1885); *Speidel* v. *Henrici,* 120 U.S. 377, 386 (1887); *Benedict* v. *City of New York,* 250 U.S. 321, 327 (1919); Restatement (Second) of the Law of Trusts § 219 comment *b* (1959)) or commits a substantial breach demonstrating that he is no longer respecting the essential terms of the trust (see G. Bogert, *The Law of Trusts and Trustees* § 951 (rev. 2d ed. 1982)).[10]

In this case, even if we assume that the "bare trust" created by Section 5 of the General Allotment Act (*Mitchell II,* 463 U.S. at 224) should be regarded as an "express trust" for these purposes, that trust was unequivocally repudiated when the BIA sold the three parcels to the Forest Service in 1954. Because respondent had notice of that sale, the six-year limitations period under 28 U.S.C. 2401(a) began to

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[10]These principles were recognized in *Manchester Band of Pomo Indians, Inc.* v. *United States,* 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), upon which respondent relies (Br. 18), and in *Lewis* v. *Hawkins,* 90 U.S. (23 Wall.) 119, 126 (1875), upon which amici rely (Nichols Amicus Br. 40-41; Navajo Amicus Br. 19). Until there is a repudiation or breach, the trust presumptively is being administered in accordance with its terms, and the beneficiary has no cause of action. G. Bogert, *supra,* § 951, at 547. But in this case, under respondent's view of BIA's statutory responsibilities, she did have a cause of action after 1954 because the trust was not being administered in accordance with its terms.

run in 1954, and this suit was barred long before it was filed in 1981.[11]

[11]Respondent (Br. 18) and amici (Nichols Amicus Br. 40-41; Navajo Amicus Br. 21 & n.32) cite several lower court decisions holding that the time limit in 26 U.S.C. 6511(a) for filing an administrative claim for a tax refund was inapplicable where taxes had erroneously been paid on income from tax-exempt property held in trust for Indians. See, *e.g.*, *Dodge* v. *United States*, 362 F.2d 810 (Ct. Cl. 1966); *Daney* v. *United States*, 247 F. Supp. 533, 535 (D. Kan. 1965), aff'd, 370 F.2d 791 (10th Cir. 1966); *Nash* v. *Wiseman*, 227 F. Supp. 552 (W.D. Okla. 1963). However, as the Court of Claims explained in *Capoeman*, those decisions have no application here. They all involved situations in which a BIA official had actually prepared the tax return for the Indian, and the Indian relied on the official to do so. See Rev. Rul. 68-172, 1968-1 C.B. 563; Rev. Rul. 61-11, 1961-1 C.B. 724. See also 34 Op. Att'y Gen. 302 (1924). An implied exception was recognized on equitable grounds because of that reliance, the resulting duty of the official to request a refund on the Indian's behalf, a likely absence of knowledge by the Indian, and a possible conflict of interest arising from the preparer's role as a personal agent for the Indian taxpayer (cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 8-9) and as an official of the taxing government.

This case differs in a number of critical respects. First, it involves an express, jurisdictional condition on Congress's waiver of the United States' sovereign immunity to suit, not a time limit for filing an administrative request with an agency. Cf. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982). Second, no government official purported to act as a personal agent on behalf of respondent or induced reliance by her; the three parcels were sold by BIA officials acting solely in their governmental capacity. Third, the sale of the parcels constituted the termination or repudiation of any trust relationship between the United States and respondent with respect to her interests in that property; the preparation of the tax return in the cases cited above did not have that effect. Fourth, respondent had notice of BIA's action. And fifth, this case involves a dispute over title to real property, in which the interests of repose underlying statutes of limitations are the strongest. *Lewis* v. *Marshall*, 30 U.S. (5 Pet.) 470, 477-478 (1831); cf. *Arizona* v. *California*, 460 U.S. 605, 620 (1983).

C

Finally, respondent argues (Br. 10-13, 18-21) that the district court had jurisdiction over this suit under 25 U.S.C. 345, which governs "actions for allotments." Respondent then contends (Br. 23-28) that no statute of limitations applies to suits against the United States under 25 U.S.C. 345 and that this suit, commenced 27 years after the sale of the allotments, therefore is not time-barred. These arguments are without merit.

1. We have shown in our opening brief (U.S. Br. 34-37) that the text and legislative history of the Act of Aug. 15, 1894, ch. 290, § 1, 28 Stat. 305, in which Section 345 was enacted, demonstrate that Section 345 was intended to authorize only suits "for an original allotment" (F. Cohen, *Handbook of Federal Indian Law* 380 n.184 (1942)). As we have further demonstrated (U.S. Br. 37-40), Congress repeatedly adhered to that view on each of the four occasions on which it enacted statutes amending or specifically pertaining to Section 345 during the 17 years after 1894. Respondent does not even discuss the text, legislative history, and contemporaneous construction of Section 345 by Congress itself.[12]

[12]Amici Nichols, et al., argue (Br. 13-16) that our submission does not take account of the language in 25 U.S.C. 345 that provides for Indians to "prosecute *or defend* any action, suit, or proceeding in relation to their right" to an allotment (emphasis added by amici). Amici also cite the language in Section 345 that refers to claims "to an allotment * * * or * * * to have been unlawfully denied or excluded from any allotment." In their view, this language contemplates a suit between two Indians concerning an allotment already made. We agree that such a suit is within the scope of 25 U.S.C. 345. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U.S. 401, 407-409 (1904). But that conclusion is entirely consistent with our submission that Section 345 authorizes suits against the United States only to challenge actions of the Secretary that are taken in the process of the initial allotment of land on the reservation. See U.S. Br. 36.

In a case such as *Hy-Yu-Tse-Mil-Kin* v. *Smith*, *supra*, the plaintiff Indian contends that he is entitled to receive an allotment of the parcel

In urging a broader interpretation of Section 345, respondent instead relies (Br. 10-13) on certain court of appeals decisions. However, as we explain in our opening brief (U.S. Br. 42-43 n.22), the earliest of those decisions was rendered more than 50 years after Section 345 was enacted in 1894 (see *Gerard* v. *United States,* 167 F.2d 951 (9th Cir. 1948)), and none of those decisions considered the legislative history of Section 345 and the subsequent statutes passed by Congress that confirm the correctness of our interpretation of Section 345. Moreover, the decisions upon which respondent relies were inconsistent with this Court's holding in *First Moon* v. *White Tail,* 270 U.S. 243 (1926), that the jurisdictional counterpart of 25 U.S.C. 345, now contained in 28 U.S.C. 1353, "has reference to *original*

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that the Secretary instead has allotted to another Indian. Once that dispute is settled, the allotment of the parcel is final, and there is no occasion for further resort to a suit under 25 U.S.C. 345. As we have explained (U.S. Br. 37-38, 39-40), that view of Section 345 underlay Congress's enactment of provisions in 1906 and 1911 to make Section 345 inapplicable to the Osage Indians and the Five Civilized Tribes, because special commissions had been established for the non-judicial resolution of disputes that might arise in the initial allotment of land to those Indians. See Act of June 28, 1906, ch. 3572, § 1, 34 Stat. 540 (repealing as to the Osage Indians the provisions of the 1894 Act that "grant[] persons of Indian blood who have been *denied allotments* the right to appeal to the courts" (emphasis added)).

This interpretation also gives meaning to the entire clause in 25 U.S.C. 345 upon which amicus Navajo Tribe relies (Br. 7-8). That clause refers to "persons * * * who claim to have been unlawfully * * * excluded from any allotment *or* any parcel of land to which they claim to be entitled" (emphasis added). The first portion of this clause would cover a situation in which a claimant has been altogether excluded from the allotment process, perhaps because he was determined not to be eligible for an allotment (see *Halbert* v. *United States,* 283 U.S. 753 (1931)); the latter portion would cover a situation in which the Secretary had determined that particular land was not suitable for allotment (see *United States* v. *Payne,* 264 U.S. 446 (1924)) or that another Indian had a superior claim to the parcel (see *Hy-Yu-Tse-Mil-Kin* v. *Smith, supra*).

allotments claimed under some law or treaty, and not to disputes concerning the heirs of one who held a valid and unquestioned allotment" (270 U.S. at 245 (emphasis added)).[13] Indeed, the Ninth and Tenth Circuits, upon

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[13]Amici Nichols, et al., contend (Br. 28) that prior to the Act of June 25, 1910, ch. 431, 36 Stat. 855 *et seq.*, which provided for the Secretary to determine the heirs of an allottee and foreclosed judicial review (see § 1, 25 U.S.C. 372), some lower courts resolved disputes among the heirs of an original allottee in suits brought under the Act of August 15, 1894, now codified at 25 U.S.C. 345. However, the only decision respondent cites for that proposition is *Patawa* v. *United States,* 132 F. 893 (C.C.D. Or. 1904), which ruled on a demurrer on other matters and did not consider this jurisdictional question. By contrast, in two other cases in which the court did consider whether the 1894 Act afforded a basis for jurisdiction, both courts expressed doubt whether the 1894 Act was intended to apply to heirship disputes (as distinguished from disputes concerning the initial execution of the allotment Act itself); but both courts found it unnecessary to resolve that question because the Act of June 25, 1910 had in any event foreclosed whatever jurisdiction might once have existed. See *Bond* v. *United States,* 181 F. 613, 616 (C.C.D. Or. 1910); *Pel-Ata-Yakot* v. *United States,* 188 F. 387, 388 (C.C. D. Idaho 1911). This Court, too, declined to consider whether the 1894 Act conferred jurisdiction to resolve disputes among the heirs of the original allottee, in light of the intervening Act of June 25, 1910. See *Hallowell* v. *Commons,* 239 U.S. 506, 508 (1916). Against this background of Congress's prompt *foreclosure* of judicial consideration of heirship questions, respondent can derive no significant support from the single heirship case she cites (*Patawa*) or the apparent handful of other cases of a similar nature in which the jurisdictional issue was not even addressed (*Bond,* 181 F. at 616).

Amici also rely (Nichols Br. 9-10, 17, 21, 25; Navajo Br. 10, 12) on *McKay* v. *Kalyton,* 204 U.S. 458 (1907). But the holding in *McKay* was simply that the *state* courts did not have jurisdiction to resolve a dispute between Indians who alleged that they were heirs of an original allottee. The Court referred to the 1894 Act in dicta, as part of a general discussion of the proposition that Congress consistently has vested responsibility for resolving matters concerning allotments in the Secretary or the federal courts. 204 U.S. at 467-469. The Court had no occasion to, and did not purport to, give a definitive construction to the 1894 Act or define its scope. Moreover, as amici Nichols, et al., concede (Br. 10-11 n.3), jurisdiction over the particular type of dispute involved in *Kalyton* itself was soon foreclosed by Congress in the Act of June 25, 1910.

whose decisions respondent principally relies, in fact had previously adopted the interpretation of Section 345 we urge in this case. See *United States* v. *Eastman*, 118 F.2d 421, 423 (9th Cir.), cert. denied, 314 U.S. 635 (1941); *Harkins* v. *United States*, 375 F.2d 239, 241 (10th Cir. 1967)(cited with approval in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 142 (1972)); *Vicenti* v. *United States*, 470 F.2d 845, 848 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973).[14]

However, there is no reason in this case for the Court to resolve the question of the precise scope of Congress's consent to suit under 25 U.S.C. 345 as originally enacted. This is so because, as explained above (see pages 8-9, *supra*), the QTA is now the exclusive means by which a claimant, including an Indian, may bring an action to resolve a disputed question of title to land in which the United States claims an interest.

2. Even if, contrary to our submission above, respondent once did have a viable cause of action under 25 U.S.C. 345 to challenge the United States' title, this suit now is barred by the statute of limitations in 28 U.S.C. 2401(a). As we explain in our opening brief (U.S. Br. 47-49), Section 2401(a) provides that "*every* civil action" against the United States shall be barred unless it is commenced within six years of the date on which the cause of action first accrued. This includes not only suits under the Tucker Act, but suits under 25 U.S.C. 345 and 28 U.S.C. 1353 as well.

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[14]Contrary to the argument of amicus Navajo Tribe (Br. 12), the Tenth Circuit in *Vicenti* did not affirm the judgment of the district court vesting title to the allotments in the Indians. The parties affected by that aspect of the district court's judgment did not appeal, and the court of appeals therefore had no occasion to consider that question. Only the Indian plaintiffs appealed, challenging the district court's refusal to award money damages against the United States. 470 F.2d at 847. In rejecting that claim, the court of appeals adhered to the "restrictive interpretation" (*id.* at 849) that it had given Section 345 in *Harkins*. Thus, it was not until *Begay* v. *Albers*, 721 F.2d 1274 (1983), that the Tenth Circuit adopted a broader view of Section 345.

Respondent relies (Br. 24-25) on the fact that prior to the 1948 revision of Title 28, a six-year statute of limitations was contained in 28 U.S.C. (1946 ed.) 41(20), the grant of Tucker Act jurisdiction to the district courts, but not in 28 U.S.C. (1946 ed.) 41(24), the predecessor to the present 28 U.S.C. 1353. However, in the 1948 revision, Congress lifted the limitations provision from the paragraph granting Tucker Act jurisdiction, where it was applicable only to actions "under this paragraph"; Congress instead placed the limitations provision in a separate Chapter 161 of Title 28, entitled "United States as a Party *Generally*" (emphasis added), and it unambiguously provided that it would apply to "every civil action" against the United States. In light of this change, it is not surprising that every court of appeals that has considered the question has concluded that the statute of limitations in 28 U.S.C. 2401(a) is not confined to Tucker Act suits. See U.S. Br. 48. In addition, the Ninth Circuit has specifically held that 28 US.C. 2401(a) applies to suits against the United States under 25 U.S.C. 345 (see U.S. Br. 32, 48), and the Eighth Circuit did not disagree in this case.[15] That settled construction of 28 U.S.C. 2401(a) should be followed here. Respondent's suit therefore is time-barred even if it does arise under 25 U.S.C. 345 and 28 U.S.C. 1353.

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[15]This case therefore is not at all like *McDonald* v. *Hovey*, 110 U.S. 619 (1884), upon which respondent relies (Br. 25-26). See also Nichols Amicus Br. 50-51. In *McDonald*, the Court observed that the phraseology of the original and revised statutes of limitation was "so nearly identical * * * in reference to the point under consideration, that we must presume they were intended to have the same construction" (110 U.S. at 623). The Court further observed that "upon a revision of statutes, a different interpretation is not to be given to them without some substantial change in phraseology—some change other than what may have been necessary to abbreviate the form of the law" (*id.* at 629). In this case, as explained in the text, there manifestly was a "substantial change in phraseology" of the statute of limitations in 1948.

CONCLUSION

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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